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Supreme Court of the United States

October Term, 1959

No. 229

CONTINENTAL GRAIN COMPANY,

Petitioner

versus

BARGE FBL-585

and

FEDERAL BARGE LINES, INC.,

Respondents

BRIF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 229

CONTINENTAL GRAIN COMPANY,

Petitioner

versus

BARGE FBL-585

and

FEDERAL BARGE LINES, INC.,

Respondents

BRIEF FOR PETITIONER

OPINIONS BELOW and JURISDICTION

The opinion of the District Court has not been reported. That of the Court of Appeals is reported at 268 F2d 240.

The Court of Appeals rendered its judgment on June 30, 1959. The petition for certiorari was filed on July

20, 1959, and was granted on October 12, 1959 (R 50). The mandate of the Court of Appeals has been stayed pending disposition of the case by this court (R 49).

Jurisdiction of this court lies under 28 USC 1254.

STATUTE INVOLVED

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Act of June 25, 1948, chapter 646, 62 Stat. 937, 28 USC 1404a.

QUESTION PRESENTED

Does 28 USC 1404a, which permits a district court to "transfer any civil action to any other district . . . where it might have been brought", authorize transfer of an admiralty action *in rem*, to a district in which the action could not have been brought—at least without the consent of both parties—because the *res* has never been located in that district?

STATEMENT OF THE CASE

This is an admiralty action for damage to cargo on a barge which sank in 1957 in Wolf River at Memphis. The action is *in rem* against the barge, and *in personam* against the barge's owner (R 2-5).

Shortly after her sinking, the barge was raised and moved to the port of New Orleans (R 12).

At the time of the filing of the libel, and of the motion to transfer, the vessel was, and still is, within the Eastern District of Louisiana, subject to jurisdiction only within that district (R 13).

After the libel was filed, the barge's owner issued to petitioner its letter of undertaking: "In consideration of (petitioner) not having seized, under the *in rem* process which has been issued in the captioned action, our Barge **FBL-585**, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel", the owner agreed that it would "file claim to Barge **FBL-585**, and pleadings", and "that, vessel lost or not lost, (it would) pay any final decree which may be rendered against said vessel in said proceeding" (R 16).¹

The undertaking further stipulated that "the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal (for the Eastern District of Louisiana) under said *in rem* process, and released by the filing of claim and release bond" (R 16-17).

The barge owner then appeared in the proceeding in the Eastern District of Louisiana, and filed claim to the barge, and its answer (R 6, 7).

¹ The undertaking is printed in full in the Appendix at pages 13-14, *post*.

Next, the owner filed a motion to transfer the action from the Eastern District of Louisiana to the Western District of Tennessee, where it had instituted a civil action against petitioner for damage sustained by the barge as a result of the sinking, ~~alleged~~ to have been caused by petitioner's fault (R 9).

In granting the motion to transfer, the District Court held that "although the case pending in Memphis will be tried by a jury, the issue therein, that is, the cause of the casualty, is precisely the issue in the case at bar"; and that "the efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being between the same parties, and relate to the same incident" (R 18-19).²

As to the *in-rem* action, the district court held that "since the barge was neither seized by the Marshal nor bonded by respondent, libelant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal

² The district court also suggested that "since the suit in the Western District of Tennessee was filed before the one here, it may be that the defendant there, the libelant here, is required under Rule 13(a), Fed. R. Civ. P. to counterclaim in that action for its cargo damage". R 19. But the barge was not a party to the Tennessee proceeding, and accordingly not subject to counterclaim. Further, Rule 82 of the Federal Rules of Civil Procedure provides that the Rules shall not be construed to extend the jurisdiction of the district courts; and since the federal court, on its civil side, could have no jurisdiction over an admiralty action *in rem*, petitioner could not have filed a "third-party" action *in rem* in the civil action in Tennessee, where the barge was not to be found in any event. See *Noma Electric Corp. vs Polaroid Corp.*, 2 FRD 454 (SD NY-1942); *Milburn vs Proctor Trust Co.*, 54 FS 989 (WD La.-1944).

Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by, for the reasons above stated, transferring this case to the Western District of Tennessee" (R 19).

On appeal under the Interlocutory Appeals Act, the transfer order was affirmed by the Court of Appeals, which conceded that the letter of undertaking requires the action to be treated in all respects as an action *in rem*; but the Court of Appeals held that an *in-rem* action may be transferred to a district "to which the movant consents to an unlimited submission of the cause", despite the fact that the *res* was not located in that district at the time of filing the libel, nor at any time thereafter.

Meanwhile, the action between petitioner and respondent in Tennessee had been concluded, which largely obviates the considerations which impelled the transfer order.

ARGUMENT

This case is to be argued following *Hoffman vs Blaski*, No. 25, and *Sullivan vs Behimer*, No. 26, which involve the related question whether an action *in personam* may be transferred to a court which has no personal jurisdiction over the defendant, except by waiver.

28 USC 1404a provides affirmatively and expressly that an action may be transferred only to another district in which "it might have been brought".

Whatever the broad connotations of the quoted phrase may be, it would appear to denote at least a district court which has jurisdiction over the action sought to be transferred.

As pointed out by the Court of Appeals for the Fourth Circuit, "it is well settled that a proceeding in rem against specific property is local in character and must be brought where the property is subject to seizure under process of the court".

That court further held that since the condemnation proceeding involved in that case "could not have been brought in any other district than that in which (the *res* was) seized, it is clear that it may not be transferred from that district under the provisions of 28 USC Sec. 1404(a)".³

The same conclusion was reached in an admiralty action *in rem* by the United States District Court for the Southern District of New York in *Broussard vs The Jersbek*, 140 FS 851 (1956); and the holding in *Broussard* is supported by a dictum of the Court of Appeals for the Second Circuit which, while upholding transfer of an admiralty action *in rem*, to a court which had jurisdiction of the *res*, stated that "it is probable that we would hold that the transfer of an *in rem* admiralty case to a court having no jurisdiction or power over the *res* was unauthorized". *Torres vs Walsh*, 221 F2d 319, 321 (1955).

³ *Clinton Foods vs United States*, 188 F2d 289, 292 (1951). *Accord: United States vs 11 Cases*, 94 FS 925 (DC Ore.-1950).

In reaching the opposite conclusion in this case, the Court of Appeals for the Fifth Circuit, while acknowledging that the action is *in rem*, refused to follow these direct precedents, and based its contrary decision primarily on its prior holding (now before this court for review) that a transitory action *in personam* may, on the defendant's motion, be transferred to a district in which venue could not have been laid without the defendant's consent.⁴

Here, the question is whether an action *in rem* may be transferred to a court which had no jurisdiction of the *res*, and in which, accordingly, the action "might (not) have been brought"—at the very least, in the absence of the consent of both parties.

The district court cases of *The Providence*, 293 Fed. 595 (DC RI-1923) and *The Yozgat*, 127 FS 446 (ED Pa. 1954), cited by the Court of Appeals for the proposition that a "thing may submit to a particular court", do not support the court's affirmative answer to the foregoing question.

⁴ Cf. the companion cases of *Ex parte Blaski*, 245 F2d 737 (CA 5-1957), *Blaski vs Hoffman*, 260 F2d 317 (CA 7-1958), *certiorari granted*, 359 US 904, and *Sullivan vs Behimer*, 261 F2d 467 (CA 7-1958), *certiorari granted*, October 12, 1959. The Court of Appeals also cited *Andino vs The SS Claiborne*, 148 FS 701 (SD NY-1957), and *May vs The Steel Navigator*, 152 FS 254 (SD NY-1957), as authority for transfer of an *in-rem* proceeding, to a district in which the *res* could not have been found; but in each case the vessel, while named in the title of the proceeding, was apparently not seized, nor a letter of undertaking given, to perfect *in-rem* jurisdiction. Thus, the orders of transfer could have referred only to the *in-personam* actions. *Andino* stands on equal footing with *Ex parte Blaski* and *Sullivan vs Behimer*, and no objection was made to the transfer in *May*.

In each of the cited cases, both libelant and claimant agreed to confer jurisdiction *in rem* on the court.⁵

In the present case, petitioner has never agreed to confer jurisdiction *in rem* on the transferee court; and the cases, just cited, holding that such jurisdiction can be conferred by consent, would at all events appear inconsistent with the established rule that the parties are powerless to confer jurisdiction by consent on a court which has no other basis for jurisdiction.⁶

This points up the distinction between this case, involving questions of jurisdiction properly so-called, and cases of the *Blaski vs Hoffman* line, involving questions of "personal jurisdiction", which relates not to the competence of the court, but to a privilege of the defendant, and is, within the boundaries of this country, closely related to, if not precisely the same as, the concept of venue.⁷

A defendant may in effect confer consent jurisdiction over his person by waiving his objection thereto; where-

⁵ Nor is the decision of the District Court for the Southern District of New York in *The New England*, 47 F2d 332 (1931), also cited by the Court of Appeals, in point here. In that case, the vessel was in fact seized and released upon claimant's filing a stipulation for value, and the only question before the court was whether libelant could recover, in that proceeding, a sum greater than the amount of the security substituted for the *res*.

⁶ *Neirbo Co. vs Bethlehem Shipbuilding Corporation*, 308 US 165 (1939). Accord: Restatement of the Law, *Conflict of Laws*, section 81, *Comment g*.

⁷ Cf. *Neirbo Co. vs Bethlehem Shipbuilding Corporation*, 308 US 165 (1939); *General Investment Company vs Lake Shore Railway Company*, 260 US 261 (1922); *Macon Grocery Company vs Atlantic Coast Line Railroad Co.*, 215 US 501 (1910).

as jurisdiction of an action, properly speaking, may not be conferred by consent of the parties."

Accordingly, there would seem to be considerable question as to whether *in-rem* jurisdiction may be conferred, in the absence of the *res* from the court's territorial jurisdiction, even by consent of both parties.

In *The Resolute*, 168 US 437, 439 (1897), this court recognized that the jurisdictional requirement "that the property proceeded against is within the lawful custody of the court", is one of the essentials for jurisdiction in the sense of "the power to adjudicate a case upon the merits".⁸

In *Ex parte Peru*, 318 US 578, 587 (1943), this court similarly held that "this case presents no question of the jurisdiction of the district court over the person of a defendant . . . Here the district court acquired jurisdiction *in rem* by the seizure and control of the vessel, and the libelant's claim against the vessel constituted a case or controversy which the court had authority to decide."

In *Cooper vs Reynolds*, 10 Wall. 308, 316 (1870), this court enumerated four separate jurisdictional concepts:

⁸ *Neirbo Co. vs Bethlehem Shipbuilding Corporation*, 308 US 165 (1939).

⁹ In *Neirbo Co. vs Bethlehem Shipbuilding Corporation*, 308 US 165, 167 (1939), this court pointed the distinction between jurisdiction in the sense of the "power to adjudicate", which cannot be conferred by consent of the parties, and jurisdiction or venue in the sense of "the locality of a law suit", which can. 28 USC 2461 provides that actual seizure of the vessel may be dispensed with in an *in-rem* admiralty case, upon filing of a bond by the claimant.

"the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and . . . the authority of the court to render the judgment or decree which it assumes to make."

In the same case, this court held that in an *in-rem* proceeding, "the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential to jurisdiction".
10 Wall. at 319.

The Restatement agrees that "a chattel is subject to the jurisdiction of the state within which it is" found, and that consent can confer only "jurisdiction over persons", not "jurisdiction over a thing";¹⁰ and it is well settled that removal of the *res* from the court's territorial jurisdiction, without fraud or impropriety, destroys pending *in-rem* jurisdiction of the case.¹¹

The necessary relation between presence of the ship and power of the court, is emphasized by the rule that

¹⁰ *Conflict of Laws*, section 49, and section 81, *Comment h*. Dicey states that *in-rem* admiralty jurisdiction vests only if the vessel is within the court's territorial jurisdiction. *Conflict of Laws* (5th ed.-1932), 269. Accord: *The Willamette*, 53 Fed. 602 (DC Wash.-1892). Cf. the anomalous decision, in *Internatio-Rotterdam, Inc. vs Thomsen*, 218 F2d 514 (CA 4-1953), that a court having no jurisdiction of the *res* has power to transfer an *in-rem* action to the court having jurisdiction of the *res*.

¹¹ *Martin vs The Bud*, 172 F2d 295 (CA 9-1949), and decisions cited. See Restatement of the Law, *Conflict of Laws*, section 105, *Comment b*. This rule does not apply when the vessel which is the subject of the suit has been released from seizure upon posting of bond pursuant to 28 USC 2161. Beale points out that the rule as to loss of jurisdiction is *contra* as to jurisdiction *in personam*. 1 *Conflict of Laws* (1935) 336, section 76.1.

"by virtue of dominion over the thing all persons interested in it are deemed to be parties to the suit, the decree binds all the world and under it the property itself passes and not merely the title or interest of a personal defendant".¹²

It thus appears that the transferee district in this case, since the res was not present therein, was not a district in which this action "might have been brought".

Therefore, even reversal of *Blaski vs Hoffman* and *Sullivan vs Behimer*, on a holding that an action may be transferred to a court on which the defendant has conferred jurisdiction over his person by waiving his objection thereto, would not necessarily involve affirmation of the holding below in this case.¹³

¹² *Rounds vs Cloverport Foundry Company*, 237 US 303, 306 (1915). See Restatement of the Law, *Conflict of Laws*, section 102, *Comment a, Illustration 3*.

¹³ Affirmance of the *Blaski* and *Sullivan* decisions would, on the other hand, necessarily entail reversal in this case; and it should be noted that the preponderance of commentary favors the correctness of the holding of the Court of Appeals for the Seventh Circuit in the *Blaski* case. See Notes, 27 George Washington Law Review 604, 57 Michigan Law Review 772, 45 Virginia Law Review 291, 72 Harvard Law Review 1375 (1959).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed, and the case remanded to that court for reversal of the District Court's order of transfer.

*Eberhard P. Deutsch,
Attorney for Petitioner*

*Deutsch, Kerrigan & Stiles,
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René H. Himel, Jr.,
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November, 1959

APPENDIX**LETTER OF UNDERTAKING**

July 23, 1958

Continental Grain Company
c/o Messrs. Deutsch, Kerrigan & Stiles
1800 Hibernia Bank Building
New Orleans, Louisiana

**Re: Continental Grain Company
vs Federal Barge Lines, Inc.
and Barge FBL 585
No. 3656 in Adm., E.D. La.**

Gentlemen:

In consideration of your not having seized, under the *in rem* process which has been issued in the captioned action, our Barge *FBL 585*, which is presently tied up at our fleet in the port of New Orleans within the jurisdiction of the United States District Court for the Eastern District of Louisiana; and in further consideration of our not being required to post the usual bond for the release of that vessel,

We agree that we shall, within the delays allowed by law and/or the rules of court, file claim to Barge *FBL 585*, and pleadings in the above-entitled and numbered action; and that, vessel lost or not lost, we shall pay any final decree which may be rendered against said vessel in said proceeding.

It is the intent of this undertaking that the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond, we, as claimant, reserving in behalf of the vessel all other objections and defenses otherwise available except those which might be predicated upon the fact that the vessel was not actually so seized.

Very truly yours,

FEDERAL BARGE LINES, INC.
By /s/ Noble C. Parsonage
NOBLE C. PARSONAGE
Vice President-Treasurer